Expert Determination Clauses - Opposing Views

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In Issue #56 of the Australian Construction Law Newsletter (see p58) we reported on the then recent unreported decision of His Honour Mr Justice Rolfe in the NSW Supreme Court in *Fletcher Construction Australia Limited v MPN Group Pty Ltd* ("*Fletcher*"). In that decision His Honour determined that an expert determination clause in a construction contract was valid.

However, a more recent decision of His Honour Mr Justice Heenan in the Supreme Court of Western Australia in *Baulderstone Hornibrook Engineering v Kayah Holdings Pty Ltd,* unreported, WA Supreme Court, 2 December 1997 ("*Baulderstone*") (see ACLN #58, p58) has found that a very similar expert determination clause was void.

In this article we will look at the two decisions and draw out the principles, if any, that may be gained from these decisions.

The Fletcher decision

The decision in *Fletcher* considered an expert determination clause which provided (in part):

> "*If the Proprietor and the Engineer are in dispute regarding any matter arising from the performance, or as to the meaning of the Agreement, then either party shall by notice in writing served on the other party require that such a dispute be resolved by the determination of an independent third party acceptable to both parties. If the parties cannot agree on the independent third party within seven days of the date of the service of the notice, then either shall request the President for the time being of The Project Managers' Forum of Australia to nominate the third party. The third party who has been agreed upon or appointed* ***shall act as an expert and not as an arbitrator*** *and that party's* ***decision shall be final and binding*** *upon the Proprietor and the Engineer.*" (Emphasis added.)

The Court, while agreeing that any clause that was a "*bare faced attempt to oust the jurisdiction of the Court*" would be contrary to public policy and void, relied on the decision of the High Court in *Dobbs v National Bank of Australia* where their Honours were of the view that:

> "*A clear distinction has always been maintained between negative restrictions upon the rights to invoke the jurisdiction of the Courts and positive provisions giving efficacy to the award of an arbitrator when made* ***or to some analogous definition or ascertainment of private rights upon which otherwise the Courts might have been required to adjudicate.*** *It has never been the policy of the law to discourage the latter. The former has always been invalid. No contractual provisions which attempt to disable a party from resorting to the Courts of law was ever recognised as valid.*" (The Court's emphasis.)

and

> "*Parties may contract with the intention of affecting their legal relations, but yet make the acquisition of rights under the contract dependent upon the arbitrament or discretionary judgment of an ascertained or ascertainable person.*"

Accordingly the Court, in considering this clause, held that it did not purport to oust the jurisdiction of the Court. While the parties could not oust the jurisdiction of the Court, they could limit the matters for consideration by the Court to the question of whether the person chosen to determine the dispute had acted within the terms of the agreement between the parties.

The Court held that there was nothing unusual about the clause providing that the expert's decision "*shall be final and binding*" or "*conclusive*". Provisions such as that do not oust the jurisdiction of the Court. It was the opinion of the Court that the effect of the clause was to make the decision of the expert final and binding provided the matters referred to him were ones contemplated by the Agreement. The expert's decision was susceptible to attack in a Court, however, if he failed to comply with the Agreement or if there was some other particular circumstance that might make the decision ineffective.

The Baulderstone decision

This case involved the interpretation of a dispute resolution clause in a construction contract that provided (in part):

> "*The Referee who has been agreed upon or appointed* ***shall act as an expert and not as an arbitrator.***
>
> *The Referee shall investigate the dispute and make his decision in any manner that he see fit, subject to the following:*
>
> - *he shall observe the principles of procedural fairness and natural justice;*
> - *he shall make his decision in writing and include it in a statement of reasons for making his decision;*
> - *the investigation and decision shall be kept confidential between the parties and the Referee.*
>
> *The* ***decision*** *of the Referee* ***shall be final and binding*** *upon the Parties, except that the Referee may correct his decision where, in his opinion, it contains a clerical mistake, an error arising from an accidental slip or omission, a defect of form, a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the decision.*" (Emphasis added.)

As a general rule, the Court acknowledged that it would recognise as proper any procedure which the parties had agreed on to settle a dispute. As the provisions of the *Commercial Arbitration Act* 1985 show where the parties have agreed in writing to refer their disputes to arbitration their agreement will be recognised and enforced. Even if the procedure agreed upon is not arbitration the agreement might well be enforceable as a matter of contract law. As such, the Court will usually not interfere when the parties have referred a matter to an expert for determination if such determination is within the referee's particular field of expertise.

The Court confirmed that the main limitation imposed upon parties attempting to prescribe their own rules of procedure is that they cannot contract out of the jurisdiction of the Court.

In this sense, the Court noted that the clause provided for the resolution of any dispute arising out of the contract and further that it purported to make any decision binding rather than as a condition precedent to a legal right capable of enforcement by action through the Court. The Court held that, to that extent, it operated to oust the jurisdiction of the Court and would not be recognised.

The Court, reading the fourth paragraph of the clause, noted that the expert was not to "*act ... as an arbitrator*". The Court felt that it was clear that the process of arbitration involved a "*judicial enquiry worked out in a judicial manner*". Accordingly, not only must the arbitrator be impartial, but unlike the expert, is to decide a dispute in accordance with the substantive law and on the basis of such evidence and submissions as the parties seek to present.

The Court noting that the points of claim and defence raised substantial points of both fact and law, held that the satisfactory determination of these matters by a referee, who is required to act as an expert and not as an arbitrator, was impossible. By its very nature, the task was one for an arbitrator and not an expert.

The Court, on a second point, determined that a broad severance clause in the contract, providing that any provision of the Agreement found to be void, illegal or unenforceable could be severed and omitted while other provisions remained in full force and effect, did not enable the Court to sever a provision of the contract to bring about a result which was in conflict with the express intentions of the parties.

Accordingly, the Court found that the dispute resolution clause was void and that the reference was permanently stayed from proceeding.

Commentary

The two clauses in these cases are so similar as to be virtually identical. Both clauses use the words "*shall act as an expert and not as an arbitrator*" and that the "*decision ... shall be final and binding upon the*" parties.

How then, can these two Courts arrive at opposing views?

First, both the New South Wales Supreme Court in *Fletcher* and the Western Australian Supreme Court in *Baulderstone* agree that any clause which attempts to oust the jurisdiction of the Court is contrary to public policy and void.

In addition, both Courts held that the parties could agree to refer any dispute between them to the determination of an independent third party. However, both Courts, whilst approaching the issue in different ways, placed restrictions on this discretion.

The Western Australian Supreme Court said that a Court would not intervene with the reference of a dispute to the expert if the determination was within the referee's particular field of expertise.

The New South Wales Supreme Court said that while the parties could not oust the jurisdiction of the Court, they could limit the matters for consideration by the Court to the question of whether the expert had acted within the terms of the agreement between the parties. The agreement between the parties obviously being the reference of the dispute to a third party for determination as an expert being a determination by the third party exercising his own skill and knowledge as an expert.

It would seem from these judgments that the two decisions can be distinguished on this basis.

In *Fletcher* the dispute concerned the performance of the Engineer in design development, in providing information adequate for tender purposes together with

an alleged failure by the Engineer to provide accurate and correct reinforcement ratios at tender; essentially questions of fact. The Court found that the dispute was of the kind referable to expert determination as considered by the clause in the agreement and was enforceable.

However, in *Baulderstone,* the Court held that there were issues as to whether the contract was partly oral and partly written, whether the defendant was required to carry out engineering and dimensional checks in addition to preparing the drawings, whether there was any agreement as to the price for additional work undertaken, whether on a correct interpretation of the contract certain work done by the defendant was included in the scope of work, as to the period during which the work was to be done by the defendant and whether there was an agreement that the defendant would carry out the work overseas and as to whether the plaintiff later directed the defendant to carry out the work in Australia.

These questions are both questions of fact and law. The Western Australian Supreme Court held that "*the determination of those matters (in dispute) by a referee who is required to act as an expert and not as an arbitrator is impossible; by its very nature the task is one for an arbitrator and not an expert*". The Court found that the expert determination procedure was entirely unsuited to the resolution of the dispute in question due to the nature of the questions that had to be determined.

Conclusions

It does not appear that any clear conclusions can be drawn from these two cases. They are from different jurisdictions and consider very different factual circumstances.

However, two things do appear certain. First, the parties to a contract must be particularly careful in both defining the extent and nature of their dispute and in selecting an appropriately qualified referee. It may be the case that whilst a Court may determine that the clause itself is valid, it may be that the issues are outside the expertise of the expert. The Court may determine that the satisfactory determination of the questions in issue, by the expert, are impossible and the clause and more particularly the appointment of the expert may be ineffective.

Secondly, an expert, in determining an issue under a dispute resolution clause, would be unwise to stray outside their area of expertise because the determination may be amenable to attack as being outside the terms of the agreement between the parties and could be struck out. ❑